

87-1788

2

Supreme Court, U.S.
FILED
APR 26 1988
JOSEPH P. SPANIOL, JR.
CLERK

No. ....

---

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1987

---

MASON H. ROSE, V,

*Petitioner,*

v.

SUSAN T. FULTZ,

*Respondent.*

---

## APPENDIX TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

---

JAMES M. WEINBERG  
2650 33rd Street  
Santa Monica, California 90405  
(213) 450-5687

*Counsel of Record  
For Petitioner*

April 26, 1988

---

6 APR



## INDEX

APPENDIX A: CONSTITUTIONAL PROVISION, RULES AND STATUTES INVOLVED	
A. UNITED STATES CONSTITUTION Fifth Amendment, Due Process Clause	1a
B. FEDERAL RULES OF CIVIL PROCEDURE Rule 62	1a
Rule 69	2a
C. FEDERAL RULES OF APPELLATE PROCEDURE Rule 8	3a
D. CALIFORNIA CODE OF CIVIL PROCEDURE, Sections:	
680.010	5a
687.010	5a
695.020	6a
697.060	7a
697.310	8a
697.340	8a
700.015	9a
701.540	9a
701.555	11a
701.560	11a
701.570	11a
701.590	12a
701.680	13a
703.010	14a
703.020	15a
703.030	15a
703.040	16a
703.510	16a
703.520	16a
703.600	17a
704.710	17a
704.720	19a
704.730	19a
704.740	21a
704.750	21a

704.760	22a
704.770	24a
704.780	25a
704.790	28a
704.800	30a
704.820	31a
704.830	32a
704.840	32a
704.850	33a
704.920	34a
704.950	35a
704.970	36a
872.210	36a
872.710	37a
872.720	37a
872.810	38a
872.820	38a
916	39a
917.1	40a
917.4	41a

E. CALIFORNIA CIVIL CODE  
Section 5120.110

43a

APPENDIX B: ORDERS, FINDINGS,  
AND JUDGMENT OF CALIFORNIA AND  
COLORADO DISTRICT COURTS

44a

A. The Order Appealed from to the  
Ninth Circuit: "Order Vacating  
Stay of Execution, Directing  
Sale of Real Property to Judg-  
ment creditor, and Directing  
Distribution of Funds Upon  
Closing," filed March 7, 1986,  
in the California District Court. 44a

B. Minute Order of the California  
District Court, filed March 3,  
1986.

51a

C. The Previous Temporary (90-Day) Stay Order: "Order on Defendant's Motion for Partial and Conditional Stay Pending Appeal, to Prevent Distress Sale of Family Home," Filed November 25, 1985, in the California District Court. 52a

D. Judgment, entered December 11, 1984, in the Colorado District Court (and registered by filing January 17, 1985, in the California District Court). 57a

APPENDIX C: NINTH CIRCUIT JUDGMENT SOUGHT TO BE REVIEWED, AND ORDER ON REHEARING

60a

A. The Judgment Sought to Be Reviewed: "Order Dismissing the Appeal as Moot," filed December 11, 1987, in the Ninth Circuit Court of Appeals, and Published as Fultz v. Rose, 833 F.2d 1380 (9th Cir. 1987). 60a

B. Order on Rehearing: Unpublished Order of the Ninth Circuit Court of Appeals, Filed January 27, 1988, Denying Rose's Petition for Rehearing. 62a



APPENDIX A:  
CONSTITUTIONAL PROVISION,  
RULES AND STATUTES INVOLVED

A. UNITED STATES CONSTITUTION

Fifth Amendment, Due Process Clause

No person shall . . . be deprived of life, liberty, or property, without due process of law; . . ."

B. FEDERAL RULES OF CIVIL PROCEDURE

Rule 62. Stay of Proceedings to Enforce a Judgment.

• • •

(d) STAY UPON APPEAL. When an appeal is taken the appellant by giving a supersedeas bond may obtain a stay . . . The bond may be given at or after the time of filing the notice of appeal or of procuring the order allowing the appeal, as the case may be. The stay is effective when the supersedeas bond is approved by the court.

• • •

(f) STAY ACCORDING TO STATE LAW. In

any state in which a judgment is a lien upon the property of the judgment debtor and in which the judgment debtor is entitled to a stay of execution, a judgment debtor is entitled, in the district court held therein, to such stay as would be accorded the judgment debtor had the action been maintained in the courts of that state.

....

Rule 69. Execution.

(a) IN GENERAL. Process to enforce a judgment for the payment of money shall be a writ of execution, unless the court directs otherwise. The procedure on execution, in proceedings supplementary to and in aid of a judgment, and in proceedings on and in aid of execution shall be in accordance with the practice and procedure of the state in which the district court is held, existing at the time the remedy is sought, except that any statute of the United States governs to the extent that

it is applicable. . . .

C. FEDERAL RULES OF APPELLATE PROCEDURE

Rule 8. Stay or Injunction Pending Appeal.

(a) STAY MUST ORDINARILY BE SOUGHT IN THE FIRST INSTANCE IN DISTRICT COURT; MOTION FOR STAY IN COURT OF APPEALS. Application for a stay of the judgment or order of a district court pending appeal, or for approval of a supersedeas bond, . . . must ordinarily be made in the first instance in the district court. A motion for such relief may be made to the court of appeals or to a judge thereof, but the motion shall show that application to the district court for the relief sought is not practicable, or that the district court has denied an application, or has failed to afford the relief which the applicant requested, with the reasons given by the district court for its action. The motion shall also show the reasons for the relief requested and the facts relied upon,

and if the facts are subject to dispute the motion shall be supported by affidavits or other sworn statements or copies thereof. With the motion shall be filed such parts of the record as are relevant. Reasonable notice of the motion shall be given to all parties. The motion shall be filed with the clerk and normally will be considered by a panel or division of the court . . . .

(b) STAY MAY BE CONDITIONED UPON GIVING OF BOND; PROCEEDINGS AGAINST SURETIES. Relief available in the court of appeals under this rule may be conditioned upon the filing of a bond or other appropriate security in the district court. . . .

D. CALIFORNIA CODE OF CIVIL PROCEDURE

Title 9 [of Part 2]. ENFORCEMENT OF JUDGMENTS.

Division 1. DEFINITIONS AND GENERAL PROVISIONS.

Chapter 1. SHORT TITLE AND DEFINITIONS.

Section 680.010. Short title.

This title shall be known and may be cited as the Enforcement of Judgments Law.

Chapter 7. LEVYING OFFICERS.

Section 687.010. Form, Content and Effect of Instructions.

(a) The judgment creditor shall give the levying officer instructions in writing. . . . The instructions shall contain the information needed or requested by the levying officer to comply with the provisions of this title, including but not limited to:

(1) An adequate description of any property to be levied upon.

(2) A statement whether the property is a dwelling.

(3) If the property is a dwelling, whether it is real or personal property.

(b) Subject to subdivision (c), the levying officer shall act in accordance with the written instructions to the extent the actions are taken in conformance

with the provisions of this title.

(c) Except to the extent the levying officer has actual knowledge that the information is incorrect, the levying officer may rely on any information contained in the written instructions.

Division 2. ENFORCEMENT OF MONEY JUDGMENTS.

Chapter 1. GENERAL PROVISIONS.

Article 1. Property Subject to Enforcement of Money Judgment.

Section 695.020. Community Property.

(a) Community property is subject to enforcement of a money judgment as provided in Title 8 commencing with Section 5100) of Part 5 of Division 4 of the Civil Code.

(b) Unless the provision or context otherwise requires, if community property that is subject to enforcement of a money judgment is sought to be applied to the satisfaction of a money judgment:

(1) Any provision of this division that applies to the property of the

judgment debtor . . . also applies to the community property interest of the spouse of the judgment debtor . . . .

(2) Any provision of this division that applies to property in the possession or under the control of the judgment debtor also applies to community property in the possession or under the control of the spouse of the judgment debtor.

Chapter 2. LIENS.

Article 1. General Provisions.

Section 697.060. Recording of Federal Court Judgment.

(a) An abstract or certified copy of a money judgment of a court of the United States that is enforceable in this state may be recorded to create a judgment lien on real property pursuant to Article 2 (commencing with Section 697.310).

• • •

Article 2. Judgment Lien on Real Property.

Section 697.310. Creation and Duration  
of Judgment Lien Based on Money  
Judgment Generally.

(a) Except as otherwise provided by statute, a judgment lien on real property is created under this section by recording an abstract of a money judgment with the county recorder.

• • •

Section 697.340. Property Attached by  
Real Property Judgment Lien.

Except as provided in Section 704.950 [which is headed "When Judgment Lien Does Not Attach to Declared Homestead"]:

(a) A judgment lien on real property attaches to all interests in real property in the county where the lien is created (whether present or future, vested or contingent, legal or equitable) that are subject to enforcement of the money judgment against the judgment debtor . . . at the time the lien was created . . .

Chapter 3. EXECUTION.

Article 4. Methods of Levy.

Section 700.015. Levy on Real Property.

(a) To levy on real property, the levying officer shall record with the recorder of the county where the real property is located a copy of the writ of execution and a notice of levy that describes the property levied upon and states that the judgment debtor's interest in the described property has been levied upon. . . .

Article 6. Sale and Collection.

Section 701.540. Notice of Sale of Real Property Interest.

(a) Notice of sale of an interest in real property shall be in writing, shall state the date, time, and place of sale, shall describe the interest to be sold, and shall give a legal description of the real property and its street address or other common designation, if any. . . .

(b) Not less than 20 days before the date of sale, notice of sale of an

interest in real property shall be served, mailed, and posted by the levying officer as provided in subdivisions (c), (d), (e), and (f).

(c) Notice of sale shall be served on the judgment debtor. Service shall be made personally or by mail.

• • •

(g) Notice of sale shall be published pursuant to Section 6063 of the Government Code, with the first publication at least 20 days prior to the time of sale, in a newspaper of general circulation published in the city in which the real property . . . is situated . . . If no newspaper of general circulation is published in the city . . ., notice of sale shall be published in a newspaper of general circulation in the county in which the real property . . . is situated.

• • •

Section 701.555. Advertisement of Sale.

In addition to the notice of sale required by this article, the judgment creditor may advertise the sale in the classified or other advertising section of a newspaper of general circulation or other publication and may recover reasonable costs of such advertising. The judgment debtor may also advertise the sale at the judgment debtor's own expense.

Section 701.560. Effect of Failure to Give Notice of Sale.

(a) Failure to give notice of sale as required by this article does not invalidate the sale.

• • •

Section 701.570. Requirements for Sale of Property.

(a) A sale of property shall be held at the date, time, and place specified in the notice of sale, which shall be in the county where the property . . . is situated and between the hours of nine in the

morning and five in the afternoon. . . .

(b) The sale shall be made at auction to the highest bidder.

. . . .

Section 701.590. Form of Payment;  
Creditor's Bid.

(a) Except as otherwise provided in this section, the purchaser at a sale shall pay in cash or by certified check or cashier's check.

(b) The judgment creditor may bid by giving the levying officer a written receipt crediting all or part of the amount required to satisfy the judgment, except that the levying officer's costs remaining unsatisfied and the amount of . . . exempt proceeds, and any other claim that is required by statute to be satisfied, shall be paid in cash or by certified check or cashier's check.

. . . .

Section 701.680. Sale absolute;  
reversed, vacated or set aside  
judgment; irregularities in  
proceedings; remedies.

(a) Except as provided in paragraph (1) of subdivision (c), a sale of property pursuant to this article is absolute and may not be set aside for any reason.

(b) If the judgment is reversed, vacated, or otherwise set aside, the judgment debtor may recover from the judgment creditor the proceeds of a sale pursuant to the judgment with interest at the rate on money judgments to the extent the proceeds were applied to the satisfaction of the judgment.

(c) If the sale was improper because of irregularities in the proceedings, because the property sold was not subject to execution, or for any other reason:

(1) The judgment debtor . . . may commence an action within six months after the date of sale to set aside the sale if the purchaser at the sale is the judgment

creditor. Subject to paragraph (2), if the sale is set aside, the judgment of the judgment creditor is revived to reflect the amount that was satisfied from the proceeds of the sale and the judgment creditor is entitled to interest on the amount of the judgment as so revived as if the sale had not been made.

(2) The judgment debtor . . . may recover damages caused by the impropriety. If damages are recovered against the judgment creditor, they shall be offset against the judgment to the extent the judgment is not satisfied. . . .

#### Chapter 4. EXEMPTIONS.

##### Article 1. General Provisions.

###### Section 703.010. Application of Exemptions.

Except as otherwise provided by statute:

(a) The exemptions provided by this chapter or by any other statute apply to all procedures for enforcement of a money

judgment.

• • •

Section 703.020. Persons Who May Claim Exemptions.

(a) The exemptions provided by this chapter apply only to property of a natural person.

(b) The exemptions provided in this chapter may be claimed by any of the following persons:

(1) In all cases, by the judgment debtor . . . .

(2) In the case of community property, by the spouse of the judgment debtor, whether or not the spouse is also a judgment debtor under the judgment.

Section 703.030. Time and Manner for Claiming Exemption.

(a) An exemption for property that is described in this chapter or in any other statute as exempt may be claimed within the time and in the manner prescribed in the applicable enforcement procedure. If

the exemption is not so claimed, the exemption is waived and the property is subject to enforcement of a money judgment.

Section 703.040. Illegality Generally of Waiver of Objection.

A purported contractual or other prior waiver of the exemptions provided by this chapter or by any other statute, other than a waiver by failure to claim an exemption required to be claimed or otherwise made at the time enforcement is sought, is against public policy and void.

Article 2. Procedure for  
Claiming Exemptions  
After Levy.

Section 703.510. Application of Article.

(a) Except as otherwise provided by statute, property that has been levied upon may be claimed to be exempt as provided in this article.

• • •

Section 703.520. Making of Claim of Exemption.

(a) The claimant may make a claim of

exemption by filing with the levying officer a claim of exemption . . . . The claim shall be made within 10 days after the date the notice of levy on the property claimed to be exempt was served on the judgment debtor.

• • •

Section 703.600. Appeal.

An appeal lies from any order made under this article and shall be taken in the manner provided for appeals in the court in which the proceeding takes place.

Article 4. Homestead Exemption.

Section 704.710. Definitions.

As used in this article:

(a) "Dwelling" means a place where a person resides and may include but is not limited to the following:

(1) A house together with the out-buildings and the land upon which they are situated.

• • •

(b) "Family unit" means any of the following:

(1) The judgment debtor and the judgment debtor's spouse if the spouses reside together in the homestead.

(2) The judgment debtor and at least one of the following persons who the judgment debtor cares for or maintains in the homestead:

(A) The minor child . . . of the judgment debtor or the judgment debtor's spouse or the minor child . . . of a . . . former spouse.

\* \* \* \*

(3) The judgment debtor's spouse and at least one of the persons listed in paragraph (2) who the judgment debtor's spouse cares for or maintains in the homestead.

(c) "Homestead" means the principal dwelling (1) in which the judgment debtor or the judgment debtor's spouse resided on

the date the judgment creditor's lien attached to the dwelling, and (2) in which the judgment debtor or the judgment debtor's spouse resided continuously thereafter until the date of the court determination that the dwelling is a homestead. . . .

Section 704.720. Exemption of Homestead and Proceeds Thereof.

- (a) A homestead is exempt from sale under this division to the extent provided in Section 704.800.
- (b) If a homestead is sold under this division . . ., the proceeds of a sale . . . are exempt in the amount of the homestead exemption provided in Section 704.430. . . .

- (c) If the judgment debtor and spouse of the judgment debtor reside in separate homesteads, only the homestead of one of the spouses is exempt . . . .

Section 704.730. Amount of Homestead Exemption.

(a) The amount of the homestead exemption is one of the following:

• • •

(2) Forty-five thousand dollars (\$45,000) if the judgment debtor or spouse of the judgment debtor who resides in the homestead is at the time of the attempted sale of the homestead a member of a family unit, and there is at least one member of the family unit who owns no interest in the homestead or whose only interest in the homestead is a community property interest with the judgment debtor.

• • •

(b) Notwithstanding any other provision of this section, the combined homestead exemptions of spouses on the same judgment shall not exceed the amount specified in paragraph (2) . . . of subdivision (a), regardless of whether the spouses are jointly obligated on the judgment and regardless of whether the homestead consists

of community or separate property or both. Notwithstanding any other provision of this article, if both spouses are entitled to a homestead exemption, the exemption of proceeds of the homestead shall be apportioned between the spouses on the basis of their proportionate interests in the homestead.

Section 704.740. General Requirements for Sale of Dwelling.

(a) . . . [T]he interest of a natural person in a dwelling may not be sold under this division to enforce a money judgment except pursuant to a court order for sale obtained under this article and the dwelling exemption shall be determined under this article.

. . . .

Section 704.750. Application for Order for Sale of Dwelling.

(a) Promptly after a dwelling is levied upon . . . , the levying officer shall serve notice on the judgment creditor that

the levy has been made and that the property will be released unless the judgment creditor complies with the requirements of this section. Service shall be made personally or by mail. Within 20 days after service of the notice, the judgment creditor shall apply to the court for an order for sale of the dwelling and shall file a copy of the application with the levying officer. If the judgment creditor does not file the copy of the application for an order for sale of the dwelling within the allowed time, the levying officer shall release the dwelling.

• • •

Section 704.760. Application for Order for Sale of Dwelling.

The judgment creditor's application shall be made under oath, shall describe the dwelling, and shall contain all of the following:

- (a) A statement whether or not the records of the county tax assessor indicate

that there is a current homeowner's exemption or disabled veteran's exemption for the dwelling and the person or persons who claim any such exemption.

(b) A statement, which may be based on information and belief, whether the dwelling is a homestead and the amount of the homestead exemption, if any, and a statement whether or not the records of the county recorder indicate that a homestead declaration under Article 5 (commencing with Section 704.910) that describes the dwelling has been recorded by the judgment debtor or the spouse of the judgment debtor.

(c) A statement of the amount of any liens or encumbrances on the dwelling, the name of each person having a lien or encumbrance on the dwelling, and the address of such person used by the county recorder for the return of the instrument creating such person's lien or encumbrance after

recording.

Section 704.770. Setting and Notice of Hearing on Application.

(a) Upon the filing of the application by the judgment creditor, the court shall set a time and place for hearing and order the judgment debtor to show cause why an order for sale should not be made in accordance with the application. The time set for hearing shall be not later than 45 days after the application is filed or such later time as the court orders upon a showing of good cause.

(b) Not later than 30 days before the time set for hearing, the judgment creditor shall do both of the following:

(1) Serve on the judgment debtor a copy of the order to show cause, a copy of the application of the judgment creditor, and a copy of the notice of the hearing in the form prescribed by the Judicial Council. Service shall be made personally or by mail.

(2) Personally serve a copy of each document listed in paragraph (1) on an occupant of the dwelling or, if there is no occupant present at the time service is attempted, post a copy of each document in a conspicuous place at the dwelling."

Section 704.780. Hearing on Application.

(a) The burden of proof at the hearing is determined in the following manner:

(1) If the records of the county tax assessor indicate that there is a current homeowner's exemption or disabled veteran's exemption for the dwelling claimed by the judgment debtor or the judgment debtor's spouse, the judgment creditor has the burden of proof that the dwelling is not a homestead. If the records of the county assessor indicate that there is not a current homeowner's exemption or disabled veteran's exemption for the dwelling claimed by the judgment debtor or the judgment debtor's spouse, the burden of

proof that the dwelling is a homestead is on the person who claims that the dwelling is a homestead.

(2) If the application states the amount of the homestead exemption, the person claiming the homestead exemption has the burden of proof that the amount of the exemption is other than the amount stated in the application.

(b) The court shall determine whether the dwelling is exempt. If the court determines that the dwelling is exempt, the court shall determine the amount of the homestead exemption and the fair market value of the dwelling and shall make an order for sale of the dwelling subject to the homestead exemption. The order for sale of the dwelling subject to the homestead exemption shall specify the amount of the proceeds of the sale that is to be distributed to each person having a lien or encumbrance on the dwelling and shall

include the name and address of each such person. Subject to the provisions of this article, the sale is governed by Article 6 (commencing with Section 701.510) of Chapter 3. If the court determines that the dwelling is not exempt, the court shall make an order for sale of the property in the manner provided in Article 6 (commencing with Section 701.510) of Chapter 3.

(c) The court clerk shall transmit a certified copy of the court order (1) to the levying officer and (2) if the court making the order is not the court in which the judgment was entered, to the clerk of the court in which the judgment was entered.

(d) The court may appoint a qualified appraiser to assist the court in determining the fair market value of the dwelling. If the court appoints an appraiser, the court shall fix the compensation of the appraiser in an amount determined by the

court to be reasonable, not to exceed similar fees for similar services in the community where the dwelling is located.

Section 704.790. Procedural Requirements on Specified Default at Hearing.

(a) This section applies in any case where the court makes an order for sale of the dwelling upon a hearing at which none of the following appeared:

(1) The judgment debtor.

(2) The judgment debtor's spouse.

(3) The attorney for the judgment debtor.

(4) The attorney for the judgment debtor's spouse.

(b) Not later than 10 days after the date of the order for sale, the judgment creditor shall serve a copy of the order and a notice of the order in the form prescribed by the Judicial Council:

(1) Personally or by mail on the judgment debtor and the judgment debtor's spouse.

(2) Personally on an occupant of the dwelling or, if there is no occupant present at the time service is attempted, post a copy of the order and notice in a conspicuous place at the dwelling.

(c) Proof of service and of any posting shall be filed with the court and with the levying officer. If the judgment creditor fails to comply with this subdivision and with subdivision (b) in any case where this section applies, the dwelling may not be sold under the order for sale.

(d) If, within 10 days after service of notice of the order, the judgment debtor or the judgment debtor's spouse files with the levying officer a declaration that the absence of the judgment debtor and the judgment debtor's spouse or the attorney for the judgment debtor or the judgment debtor's spouse from the hearing was due to mistake, inadvertence, surprise, or excusable neglect and that the judgment

debtor or spouse of the judgment debtor wishes to assert the homestead exemption, the levying officer shall transmit the declaration forthwith to the court. Upon receipt of the declaration, the court shall set a time and place for hearing to determine whether the determinations of the court should be modified. The time set for hearing shall be not later than 20 days after receipt of the declaration. The court clerk shall cause notice of the hearing promptly to be given to the parties.

Section 704.800. Insufficient Sale Bids.

(a) If no bid is received at a sale of a homestead pursuant to a court order for sale that exceeds the amount of the homestead exemption plus any additional amount necessary to satisfy all liens and encumbrances on the property, including but not limited to any attachment or judgment lien, the homestead shall not be sold and

shall be released and is not thereafter subject to a court order for sale upon subsequent application by the same judgment creditor for a period of one year.

(b) If no bid is received at the sale of a homestead pursuant to a court order for sale that is 90 percent or more of the fair market value determined pursuant to Section 704.780, the homestead shall not be sold unless the court, upon motion of the judgment creditor, does one of the following:

(1) Grants permission to accept the highest bid that exceeds the amount of the minimum bid required by subdivision (a).

(2) Makes a new order for sale of the homestead.

Section 704.820. Joint tenancy,  
tenancy in common . . .

If the dwelling is owned by the judgment debtor as a joint tenant or tenant in common . . .:

(a) At an execution sale of a dwelling, the interest of the judgment debtor in the dwelling and not the dwelling shall be sold. If there is more than one judgment debtor of the judgment creditor, the interests of the judgment debtors in the dwelling shall be sold together and each of the judgment debtors entitled to a homestead exemption is entitled to apply his or her exemption to his or her own interest.

(b) For the purposes of this section, all references in this article to the "dwelling" or "homestead" are deemed to be references to the interest of the judgment debtor in the dwelling or homestead.

Section 704.830. . . .; Appeal.

The provisions of [Section] 703.600 apply to proceedings under this article.

Section 704.840. Costs.

(a) Except as provided in subdivision (b), the judgment creditor is entitled to

recover reasonable costs incurred in a proceeding under this article.

(b) If no bid is received at a sale of a homestead pursuant to a court order for sale that exceeds the amount of the homestead exemption plus any additional amount necessary to satisfy all liens and encumbrances on the property, the judgment creditor is not entitled to recover costs incurred in a proceeding under this article or costs of sale.

Section 704.850. Distribution of Proceeds of Sale.

(a) The levying officer shall distribute the proceeds of sale of a homestead in the following order:

(1) To the discharge of all liens and encumbrances, if any, on the property.

(2) To the judgment debtor in the amount of any applicable exemption of proceeds pursuant to Section 704.720.

(3) To the levying officer for the reimbursement of the levying officer's

costs for which an advance has not been made.

(4) To the judgment creditor to satisfy the following:

(A) First, costs and interest accruing after issuance of the writ pursuant to which the sale is conducted.

(B) Second, the amount due on the judgment with costs and interest, as entered on the writ.

(5) To the judgment debtor in the amount remaining.

(b) Sections 701.820 and 701.830 apply to distribution of proceeds under this section.

Article 5. Declared Homesteads.

Section 704.920. Creation of Declared Homestead.

A dwelling in which an owner or spouse of an owner resides may be selected as a declared homestead pursuant to this article by recording a homestead declaration

in the office of the county recorder of the county where the dwelling is located. From and after the time of recording, the dwelling is a declared homestead for the purposes of this article.

Section 704.950. When Judgment Lien Does Not Attach to Declared Homestead.

(a) . . . [A] judgment lien on real property created pursuant to Article 2 (commencing with Section 697.310) of Chapter 2 does not attach to a declared homestead if both of the following requirements are satisfied:

(1) A homestead declaration describing the declared homestead was recorded prior to the time the abstract or certified copy of the judgment was recorded to create the judgment lien.

(2) The homestead declaration names the judgment debtor or the spouse of the judgment debtor as a declared homestead owner.

• • •

Section 704.970. Levy Pursuant to Writ of Execution.

Whether or not a homestead exemption has been recorded:

(a) Nothing in this article affects the right of levy pursuant to a writ of execution.

(b) Any levy pursuant to a writ of execution on a dwelling (as defined in Section 704.710) and the sale pursuant thereto shall be made in compliance with Article 4 (commencing with Section 704.710) and the judgment debtor and the judgment creditor shall have all the rights and benefits provided by that article.

Title 10.5. PARTITION OF REAL AND PERSONAL PROPERTY.

Chapter 2. COMMENCEMENT OF ACTION.

Article 1. Complaint and Lis Pendens.

Section 872.210. Who May Commence Action.

(a) A partition action may be commenced

and maintained by any of the following persons:

• • •

(2) An owner of an estate of inheritance . . . in real property where such property or estate therein is owned by several persons concurrently . . .

Chapter 3. TRIAL.

Article 2. Determination of Right to Partition.

Section 872.710. Right of Plaintiff to Partition; Concurrent Interests

• • •

(a) At the trial, the court shall determine whether the plaintiff has the right to partition.

(b) . . . [P]artition as to concurrent interests in the property shall be as of right unless barred by a valid waiver.

• • •

Section 872.720. Interlocutory Judgment.

(a) If the court finds that the plaintiff is entitled to partition, it shall

make an interlocutory judgment that determines the interests of the parties in the property and, unless it is to be later determined, the manner of partition.

• • •

Article 3. Determination of  
Manner of Partition.

Section 872.810. Division According  
to Interests.

The court shall order that the property be divided among the parties in accordance with their interests in the property as determined in the interlocutory judgment.

Section 872.820. Sale of Property;  
Division of Proceeds.

Notwithstanding Section 872.810, the court shall order that the property be sold and the proceeds be divided among the parties in accordance with their interests in the property as determined in the interlocutory judgment in the following situations:

(a) The parties agree to such relief, by their pleadings or otherwise.

(b) The court determines that, under the circumstances, sale and division of the proceeds would be more equitable than division of the property. . . .

Title 12. APPEALS IN CIVIL ACTIONS.

Chapter 2. STAY OF ENFORCEMENT  
AND OTHER PROCEEDINGS.

Section 916. Stay on Perfection of  
Appeal; Proceeding Upon Matters  
Not Affected by Appeal."

(a) Except as provided in Sections 917.1 through 917.9 . . ., the perfecting of an appeal stays proceedings in the trial court upon the judgment or order appealed from or upon the matters embraced therein or affected thereby, including enforcement of the judgment or order, but the trial court may proceed upon any other matter embraced in the action and not affected by the judgment or order.

(b) When there is a stay of proceedings other than the enforcement of the

judgment, the trial court shall have jurisdiction of proceedings related to the enforcement of the judgment as well as any other matter embraced in the action and not affected by the judgment or order appealed from.

Section 917.1. Appeal from Money Judgment; Undertaking to Stay Enforcement; . . .

(a) The perfecting of an appeal shall not stay enforcement of the judgment or order in the trial court if the judgment or order is for money or directs the payment of money, whether consisting of a special fund or not, and whether payable by the appellant or another party to the action, unless an undertaking is given.

(b) The undertaking shall be on condition that if the judgment or order or any part of it is affirmed or the appeal is withdrawn or dismissed, the party ordered to pay shall pay the amount of the judgment or order, or the part of it as to

which the judgment or order is affirmed, as entered after the receipt of the remittitur, together with any interest which may have accrued pending the appeal and entry of the remittitur, and costs which may be awarded against the appellant on appeal. . . . The undertaking shall be for double the amount of the judgment or order unless given by an admitted surety insurer in which event it shall be for one and one-half times the amount of the judgment or order. The liability on the undertaking may be enforced if the party ordered to pay does not make the payment within 30 days after the filing of the remittitur from the reviewing court.

• • •

Section 917.4. Judgment Directing Sale, Conveyance or Delivery of Real Property.

The perfecting of an appeal shall not stay enforcement of the judgment or order in the trial court if the judgment

or order appealed from directs the sale, conveyance or delivery of possession of real property which is in the possession or control of the appellant or the party ordered to sell, convey or deliver possession of the property, unless an undertaking in a sum fixed by the trial court is given that the appellant or party ordered to sell, convey or deliver possession of the property will not commit or suffer to be committed any waste thereon and that if the judgment or order appealed from is affirmed, or the appeal is withdrawn or dismissed, the appellant shall pay the damage suffered by the waste and the value of the use and occupancy of the property, or the part of it as to which the judgment or order is affirmed, from the time of the taking of the appeal until the delivery of the possession of the property. . . .

E. CALIFORNIA CIVIL CODE.

Part 5 [of Division IV]. THE FAMILY  
LAW ACT.

Title 8. HUSBAND AND WIFE.

Chapter 3. LIABILITY OF MARITAL  
PROPERTY.

Article 2. General Rules of  
Liability.

Section 5120.110. Community Property;  
Earnings of Married Person.

(a) Except as otherwise expressly provided by statute, the community property is liable for a debt incurred by either spouse before or during marriage, . . . regardless whether one or both spouses are parties to the debt or to a judgment for the debt.

• • •

APPENDIX B:  
ORDERS, FINDINGS, AND JUDGMENT  
OF CALIFORNIA AND COLORADO  
DISTRICT COURTS

A. The OrderAppealed from to the Ninth Circuit: "Order Vacating Stay of Execution, Directing Sale of Real Property to Judgment Creditor, and Directing Distribution of Funds Upon Closing," filed March 7, 1986, in the California District Court.

UNITED STATES DISTRICT COURT  
CENTRAL DISTRICT OF CALIFORNIA

CIVIL ACTION NO. MISC 15142  
85-1854-TJH (Bx)

SUSAN THERESE FULTZ a/k/a  
SUSAN FULTZ-SMALL,  
Plaintiff,  
vs.  
MASON H. ROSE, V.,  
Defendant.

---

ORDER VACATING STAY OF EXECUTION,  
DIRECTING SALE OF REAL PROPERTY TO  
JUDGMENT CREDITOR, AND DIRECTING  
DISTRIBUTION OF FUNDS UPON CLOSING

DATE: March 3, 1986

[Filed March 7, 1986]

---

THIS MATTER having come regularly before the Court on March 3, 1986, upon the Defendant's Motion for Continuance of Order Granting 90 Day Stay of Execution. At the

hearing conducted herein, Plaintiff was represented by Messrs. James A. Beckwith and Joseph M. Ferrante, and Defendant Mason H. Rose V was represented by Mr. James M. Weinberg. After consideration of the arguments of counsel, together with the pleadings and memoranda of law, the Court:

MAKES THE FOLLOWING FINDINGS OF FACT:

1. That on November 25, 1985, this Court granted Defendant a 90 day stay of execution of enforcement of money judgment for the purpose of allowing Defendant Mason H. Rose V (Rose), at his express request, to obtain a bona fide buyer for the property located at 37 Crest Road West, Rolling Hills, California, for the sum of \$600,000.00.

2. That on March 3, 1986, the indebtedness on said property to American Savings & Loan Association, Mr. Ellis Ring and one Mr. Joseph Smith is \$428,777.12.

3. That Plaintiff, in accordance with

her right under Section 701.590 C.C.C.P. has tendered her bid on said real property in the sum of \$321,222.68.

4. That the total of Plaintiff's bid and the prior lienholders equals \$750,000.00: the same being the appraised market value of the property.

5. That plaintiff has obtained a contract buyer for the property with whom she may readily consummate and close a resale of the property at \$750,000.00. This contract buyer has waited patiently to purchase the property since August, 1985. However, due to relaxation in interest rates, he will withdraw his offer if the property is not sold at this time.

6. That from the resale of the property to Plaintiff's contract buyer, Plaintiff proposes a distribution which will satisfy the prior lienholders, selling costs and voluntarily allow a \$45,000.00 homestead exemption for Wynonah D. Rose.

7. That Plaintiff's buyer did, on December 24, 1985, perform a physical inspection of the premises at 37 Crest Road West. Although noting the immediate need for repairs in the estimated sum of \$200,000.00, the buyer has nevertheless affirmed his offer to purchase the property from plaintiff.

8. That Plaintiff's bid and plan of distribution is bona fide, fair, reasonable, and completely in accord with Defendant's desire for a sale of the property at \$321,222.68, as expressed to this court on November 25, 1985.

9. That defendant has, since November 25, 1985, not committed any act in furtherance of his desire to obtain a private buyer. The defendant has not listed the property for sale, nor has he made any repairs to the property, nor has he contracted for any repairs to the property.

10. The court notes that there are

numerous lien claims made on the subject property, including the assertion of homestead exemptions by Wynonah D. Rose. It is obvious, and the parties here do not dispute, that the subject property will ultimately be sold, whether by plaintiff, by other lien claimants, or by defendant and his ex-wife Wynonah in their pending divorce proceedings. It is therefore in the interests of all parties and claimants to sell the property at the highest price obtainable with the least amount of expense in doing so. The court finds that plaintiff's contract buyer in affirming the purchase price of \$750,000.00 has tendered such an offer.

11. The court further notes that Wynonah D. Rose, defendant's ex-wife and a person directly affected by the sale of the property, has offered, and Plaintiff has accepted, to convey her one-half interest in the property to plaintiff by

quit-claim deed, upon plaintiff acquiring the property at execution sale. Wynonah D. Rose, together with the minor children of Defendant, reside at the property. The fact of this offer and agreement is compelling to this court and cannot be ignored.

AND THEREFORE ENTERS THE FOLLOWING ORDERS:

1. This Court's Order of November 25, 1985, granting a 90 day stay of execution, is hereby vacated and withdrawn.
2. The bid of Plaintiff Susan T. Fultz, pursuant to Section 701.590 C.C.C.P., in the amount of \$321,222.68 is hereby accepted by the Court.
3. The United States Marshall [sic], Central District of California, is hereby ordered to forthwith execute and deliver to Plaintiff Susan T. Fultz, or her attorney of record, a Marshall's [sic] Deed conveying to her all right, title and interest of Mason H. Rose and Wynonah D.

Rose in and to the following described real property:

Lot 3 of Tract 29408 as recorded in Book 308, Pgs. 27, 28, and 29 Maps of the Recorder's Office of Los Angeles County, California, and more commonly known as 37 Crest Road West, Rollings [sic] Hills, California.

4. That Plaintiff shall, within 90 days of this Order, or in such additional time as may be granted by this Court, conduct a closing on the resale of the subject property to her contract buyer. From such sale, Plaintiff shall satisfy the three prior lienholders identified herein.

5. That, in addition, Plaintiff shall, from said closing, satisfy all customary closing costs, realtor's commissions and deliver the sum of \$45,000.00 to Wynonah D. Rose, or her authorized attorney, which sum shall, upon delivery, satisfy the homestead claim(s) of Wynonah D. Rose and/or Mason H. Rose V. in and to the subject property. Upon such delivery,

- 51a -

Plaintiff shall be relieved of any and all further obligation for homestead rights, claims or exemptions on said property.

6. That all remaining sum [sic] after satisfaction of Paragraphs 4 and 5 above, shall be plaintiff's property to apply against her judgment.

7. Nothing in this Order shall be construed as abating, altering or effecting [sic] in any manner the claims of Plaintiff on other real property to satisfy the entirety of her judgment.

ORDERED AND SIGNED this 7th day of March, 1986.

BY THE COURT:

/s/

Honorable Terry J. Hatter, Jr.  
Judge Presiding

B. Minute Order of the California District Court, filed March 3, 1986.

UNITED STATES DISTRICT COURT  
CENTRAL DISTRICT OF CALIFORNIA

CIVIL MINUTES -- GENERAL

Case No. CV 85-1854-TJH Date 3/3/86  
Title Susan Therese Fultz vs Mason Rose V

PRESENT:

HON. TERRY J. HATTER, JR., JUDGE  
Florence Kato Deputy Clerk  
Lynne Attardi Court Reporter

ATTORNEYS PRESENT FOR PLAINTIFFS:

James Beckwith  
Joseph Ferrante

ATTORNEYS PRESENT FOR DEFENDANTS:

James Weinberg

PROCEEDINGS: HRG re Deft's Motion for  
Release of Dwelling and For Condi-  
tional Stay Pending Appeal

Oral arguments heard. Motion denied.  
Stay vacated.

C. The Previous Temporary (90-Day) Stay  
Order: "Order on Defendant's Motion  
for Partial and Conditional Stay  
Pending Appeal, to Prevent Distress  
Sale of Family Home," filed November  
25, 1985, in the California District  
Court.

UNITED STATES DISTRICT COURT  
CENTRAL DISTRICT OF CALIFORNIA

---

ORDER ON DEFENDANT'S MOTION FOR  
PARTIAL AND CONDITIONAL STAY PENDING  
APPEAL, TO PREVENT DISTRESS SALE  
OF FAMILY HOME

[Filed November 25, 1985]  
[Caption Omitted]

---

Defendant's Motion for Partial and Conditional Stay Pending Appeal, to Prevent Distress Sale of Family Home and Permit the Orderly Sale Thereof came on regularly for hearing before this Court on November 25, 1985. Plaintiff was represented by James A. Beckwith, and Defendant by James M. Weinberg.

After consideration of the documents and evidence filed by the parties, and the arguments of their respective counsel, the Court grants the motion upon each of the terms and conditions specified herein, and

ORDERS THAT:

The Marshall's [sic] sale of the Rose family home (located at 37 Crest Road West, Rolling Hills, California), which was previously stayed through and including November 25, 1985 (by this Court's Order of September 26, 1985), is hereby further stayed during the pendency of the appeal from this Court's "Order After

Contempt Hearing July 15, 1985" (which appeal is now pending in the Ninth Circuit Court of Appeals, Docket No. 85-6202) but only on condition:

(1) That Defendant Rose, on or before Monday, December 1, 1985, prepay, bond, or deposit in court all interest on the prior first and second trust deed loans on said property, for the period from but not including November 25, 1985, through and including December 31, 1985.

(2) That Defendant Rose, on or before January 2, 1986, and on or before the first day of each calendar month thereafter throughout the period of the stay hereunder, prepay, bond or deposit in court all interest on the prior first and second trust deed loans on said property, for the period from but not including the last day of the preceding calendar month, through and including the last day of the current calendar month; if the first day

of any such calendar month is not a business day, the due date hereunder shall be extended to the next business day.

(3) That Mr. Rose continue, in full force and effect, all hazard insurance on said property, throughout the period of the stay hereunder, by paying any and all premiums on or before their respective due dates.

(4) That Mr. Rose pay, on or before December 10, 1985, and on or before each subsequent tax delinquency date during the period of the stay hereunder, all property taxes payable on the property.

(5) That Mr. Rose, and Mrs. Wynonah D. Rose, agree to endeavor to maintain the property in at least its present condition, and not to commit any act that would decrease the value of property, excepting only reasonable wear and tear and action of the elements.

(6) That any sale of the property be

for all cash, except only that, if and to the extent that the net proceeds of the sale exceed the amount that would have been derived from an all cash sale of \$675,000 on August 22, 1985 (the amount of the Minimum Bid advertised by Plaintiff for her contemplated sale that was advertised for that date) it may be for other than cash (such as by an indebtedness secured by a junior lien on the property).

(7) That the net proceeds of the sale (whether consisting of cash, evidence of indebtedness, payments on indebtedness, or otherwise) be deposited in this Court, for distribution only pursuant to further order of this Court or the United States Bankruptcy Court for this district. As used in this paragraph 7 and in the proceeding [sic] paragraph 6, "net proceeds of the sale" refers to the gross amounts received from the sale, less only (1) the payments required to fully pay off and

obtain a reconveyance of the first and second trust deeds on the property; (2) selling costs and commissions on the sale of the property, which shall not exceed those customary for similar sales of similar properties in the same general area; and (3) reimbursement to Mr. Rose (or direct payment to third parties who have not yet been paid) of any costs of maintenance or repairs, or fix-up-costs, actually incurred, reasonably and in good faith, in connection with the sale of the property.

The stay is for a period of 90 days.

DATED: November 25, 1985.

/s/

Honorable Terry J. Hatter, Jr.  
Judge of the United States  
District Court

D. Judgment, entered December 11, 1984, in  
the Colorado District Court (and regis-  
tered by filing January 17, 1985, in  
the California District Court). \*/

---

\*/ The Colorado default judgment was accompanied by findings and an order, set forth in Rose's previous petition for certiorari (in No. 87-1559) at 25a-42a.

IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLORADO

Civil Action No. 83-M-2163

SUSAN THERESE FULTZ  
a/k/a SUSAN FULTZ-SMALL,  
Plaintiff,

v.

MASON H. ROSE, V., H.L. QUIST, and  
H.L. QUIST MANAGEMENT AND DEVELOPMENT  
CORPORATION,

Defendants.

---

JUDGMENT  
[Entered December 11, 1984]

---

Pursuant to and in accordance with the  
Findings of Fact and Order for Default  
Judgment, entered by the Honorable Richard  
P. Matsch, Judge, signed and filed on De-  
cember 11, 1984, and it is

ORDERED, that judgment is entered in  
favor of the plaintiff and against the  
defendant Mason H. Rose, V., and it is

FURTHER ORDERED, that the plaintiff  
shall have and recover from the defendant  
Mason H. Rose, V., compensatory damages  
in the amount of \$106,128.34 which in-  
cludes 15% interest per annum on the

unpaid lease value to the date of this judgment; attorney's fees in the amount of \$9,917.19 pursuant to the Equipment Lease Agreement for a total compensatory damages of \$116,045.53, and it is

FURTHER ORDERED, that the plaintiff shall have and recover from the defendant Mason H. Rose, V., punitive damages in the amount of \$348,136.59 plus court costs, as determined by the Local Rule 105, in the amount of \$570.50 for a total judgment of \$464,752.62 which sum shall bear interest at the rate of 9.5% from the date of the entry of this judgment, and it is

FURTHER ORDERED, that this judgment is a final judgment under F.R.Civ.P. 54(b) because there is no just reason for delay.

DATED at Denver, Colorado, this 11th day of December, 1984.

FOR THE COURT:

JAMES R. MANSPEAKER, CLERK  
/s/

---

Stephen P. Ehrlich,  
Chief Deputy Clerk

APPENDIX C:  
NINTH CIRCUIT JUDGMENT  
SOUGHT TO BE REVIEWED, AND  
ORDER ON REHEARING

A. The Judgment Sought to Be Reviewed:  
"Order Dismissing the Appeal as Moot,"  
Filed December 11, 1987 in the Ninth  
Circuit Court of Appeals, and Published  
as Fultz v. Rose, 833 F.2d 1380 (9th  
Cir. 1987).

FOR PUBLICATION

UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT

No. 86-5829  
D.C. No. CV 85-1854

SUSAN THERESE FULTZ, a/k/a Susan Fultz-  
Small, Plaintiff-Appellee,  
v.  
MASON H. ROSE, V, Defendant-Appellant.

---

ORDER DISMISSING THE  
APPEAL AS MOOT

---

Appeal from the United States District  
Court for the Central District  
of California  
Terry J. Hatter, Jr.,  
District Judge, Presiding

Argued and Submitted  
November 6, 1987--Pasadena, California

Filed December 11, 1987

Before: Arthur L. Alarcon, Dorothy W.  
Nelson and Stephen Reinhardt,  
Circuit Judges.

COUNSEL

James A. Beckwith, Wheat Ridge, Colorado,  
for the plaintiff-appellee.

James M. Weinberg, Los Angeles, California,  
for the defendant-appellant.

---

ORDER

The appeal in the above captioned action is hereby DISMISSED as moot. An appeal must be dismissed as moot when intervening events that do not involve wrongful conduct by the appellee leave the appellate court unable to grant effective relief. In re Combined Metals Reduction Co., 557 F.2d 179, 187 (9th Cir. 1977). Fultz sold the Rose property to Mr. and Mrs. Hawkins in compliance with the district court's March 7, 1986 order. Because Mr. and Mrs. Hawkins are not parties to this action, we are no longer able to grant any effective relief from that order or to reach the merits of this appeal.

In accordance with the Supreme Court's guidance in United States v. Munsingwear, 340 U.S. 36, 39 (1950), we dismiss this appeal and vacate the district court's order entered March 7, 1986. Vacation of the March 7 order shall not operate retroactively and shall have no legal effect on actions or conduct already undertaken in reliance on or under the authority of that order.

B. Order on Rehearing: Unpublished Order of the Ninth Circuit Court of Appeals, Filed January 27, 1988, Denying Rose's Petition for Rehearing.

UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT

No. 86-5829

---

ORDER

[Filed January 27, 1988]  
[Caption Omitted]

---

Before: ALARCON, NELSON and REINHARDT,  
Circuit Judges.

Upon due consideration, the Petition for Rehearing is DENIED.

